No. 83-214

In The

Supreme Court of the United States

October Term, 1983

ONE PARCEL OF LAND IN MONTGOMERY COUNTY, MARYLAND and

VIRGINIA C. VISNICH,

Petitioner,

vs.

WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Is the Washington Metropolitan Area Transit Authority, which is an agency and product of an interstate compact, authorized to exercise federal quick-take condemnation powers solely by virtue of congressional consent to the interstate compact where the compact does not specifically grant quick-take condemnation powers and where no government pledges its credit to insure the payment of just compensation?

2. Are the constitutional requirements of just compensation satisfied when interest on the deficiency in a quick-take condemnation case is awarded at a rate below that which is earned by the court itself on the original deposit?

PARTIES

The parties to this proceeding are as set forth in the caption of the case.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit, reported at 706 F.2d 1312 (4th Cir. 1983) appears in the appendix to this petition (25a). The opinion of the United States District Court for the District of Maryland reported at 490 F. Supp. 1328 (D. Md. 1980) appears in the appendix to this petition (6a).

JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit was dated and entered May 4, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1) and Rules 17.1(a) and (c) of the Rules of this Court.

RELEVANT CONSTITUTIONAL AND CODE PROVISIONS

The constitutional, statutory and compact provisions relevant to this case are set forth in the appendix to this petition (2a-5a).

STATEMENT OF THE CASE

The petitioner, Virginia C. Visnich, is the owner of a parcel of land situated in Montgomery County, Maryland at the intersection of Maryland Route 355 and Shady Grove Road, north of Rockville, Maryland. The respondent, Washington Metropolitan Area Transit Authority (WMATA) is the product of an interstate compact the signatories of which are Maryland, Virginia and the District of Columbia. WMATA is in the process of constructing a rapid rail transit system which will extend in part from the District of Columbia to areas of Montgomery County, Maryland. One line of this system will run parallel to Maryland Route 355 and will terminate at the intersection of Maryland Route 355 and Shady Grove Road. The terminal station for this line will be situated on the landowner's property described above.

On May 12, 1978 WMATA filed a Declaration of Taking and a complaint for condemnation in the United States District Court for the District of Maryland. Jurisdiction in the United States District Court was invoked pursuant to §81 of the WMATA Compact. Transportation Article §10-204(81), Annotated Code of Maryland; D.C. Code §1-2431(81). By these pleadings WMATA

purported to proceed under the Federal Declaration of Taking Act, 40 U.S.C. §258(a), which permits the condemnor, acting by and in the name of and under the authority of the United States, to take immediate possession of private property upon depositing into the registry of the court its estimate of just compensation. (This procedure is referred to herein as "quick-take" condemnation and is in contrast to general condemnation procedures by which the just compensation is determined and paid to the landowner before the condemnor may take possession of the property). In this case WMATA deposited $1,710,400 as its estimate of just compensation and obtained an order of possession.

The landowner denied the authority of WMATA to take immediate possession of her private property via quick-take procedures. The landowner moved to vacate the Declaration of Taking on the ground that WMATA lacked authority to take such action. In a written opinion the magistrate denied the landowner's motion ruling that WMATA possessed quick-take condemnation powers and on appeal to the court this ruling was upheld. (Jones, J.) *WMATA v. One Parcel of Land in Montgomery Co.*, 490 F. Supp. 1328 (D. Md. 1980).

The case proceeded before a Land Commission appointed pursuant to Federal Rules of Procedure, Rule 71A which determined the amount of just compensation to be awarded to the landowner. Its award of $4,997,203 exceeded WMATA's initial deposit of estimated just compensation by $3,286,803.

Under the appropriate federal law and pursuant to the constitutional requirements of just compensation, the landowner is entitled to interest on the $3,286,803 deficiency from the date of the initial deposit. Interest was awarded in this case at various rates from 8.73% per annum in 1978 to 14.02% per annum in 1981. The landowner filed a motion for additional interest on the grounds that in order to constitute just compensation the rate

of interest on the deficiency should have been at least equivalent to the rate of return realized on the funds initially deposited and invested by the court.

On July 18, 1978, pursuant to court order, the clerk of the court invested the monies deposited in United States Treasury Bills and the bills were continuously rolled over. As a result of these investments the initial deposit as of October 21, 1981 had accumulated $750,752.86. This is equivalent to an annual gain of 13.50566% for the 39 month period from July 18, 1978 to October 21, 1981. Consequently the landowner moved for an award of interest which, at a minimum, would be equivalent to the rate of return on those funds deposited in the registry of the court.

The motion of the landowner was denied by the magistrate and on appeal to the court, the magistrate's ruling was affirmed. A final order of just compensation was entered and an appeal to the United States Court of Appeals for the Fourth Circuit was duly noted. In an opinion dated May 4, 1983, the United States Court of Appeals for the Fourth Circuit (Winter, Widener and Bryan, JJ.) affirmed the rulings of the District Court. The landowner now petitions this Honorable Court to consider and determine the important constitutional issues presented in this case.

REASONS FOR GRANTING THE WRIT

I.

The Washington Metropolitan Area Transit Authority, which is an agency and product of an interstate compact, is not authorized to exercise federal quick-take condemnation powers solely by virtue of congressional consent to the interstate compact where the compact does not specifically grant quick-take condemnation powers and where no government pledges its credit to insure the payment of just compensation.

Central to the determination of the issues in this case is the construction of the Compact Clause of the United States Constitution. Art. I, §10, cl.3. The Court of Appeals held that WMATA is authorized to exercise quick-take condemnation powers in Maryland because those powers had been delegated to it not by the State of Maryland but rather by the federal government. The State of Maryland is constitutionally prohibited from exercising and therefore delegating quick-take powers. Article III §40, Constitution of Maryland; *Acting Director v. Walker,* 284 Md. 357, 396 A.2d 262 (1979); *Acting Director v. Walker,* 271 Md. 711, 319 A.2d 806 (1974). The court reached this result by holding that congressional consent to the WMATA compact transformed that compact into substantive and affirmative federal law. The court recognized that WMATA, not being a sovereign, possessed no inherent powers of eminent domain; rather, any power of condemnation which WMATA did possess was by necessity delegated to it by a higher sovereign. The court further recognized that Maryland could not constitutionally delegate quick-take condemnation powers. Consequently, the court concluded that those powers must have come from the federal government and that the power was delegated pursuant to congressional consent to the WMATA Compact.

The landowner argued below that congressional consent to an interstate compact does not transform that compact into federal law to the extent that powers delegated to an agency pursuant to that compact constitutes an affirmative delegation of power from the federal government. In rejecting the landowner's argument the Court of Appeals was "guided" by the Supreme Court's recent decision in *Cuyler v. Adams,* 449 U.S. 433, 101 S. Ct. 703, 66 L. Ed. 2d 641 (1981). The Court of Appeals recognized that "no prior case goes so far as to hold that consent [of congress to an interstate compact] may constitute delegation of federal power to the authority created by the compact". The court then made precisely that decision.

In determining the propriety of considering and deciding this issue as well as addressing the soundness of the lower court's decision, the history of Supreme Court rulings in this area should be reviewed. The effect of congressional consent upon an interstate compact was considered by this Court at least as early as 1851. In *Pennsylvania v. Wheeling and Belmont Bridge Co.,* 13 How. 518 (1851) the Supreme Court construed an interstate compact between Virginia and Kentucky. The Court, almost in passing, stated that "[T]his compact, by the sanction of Congress, has become a law of the Union. What further legislation can be desired for judicial action?" *Id.* at p. 566. In a strong dissent, Mr. Chief Justice Taney argued that the Court had no jurisdiction to hear the matter. In his dissent he argued that the Act of Congress giving consent to the interstate compact makes no reference to the terms of the compact itself. It does not make the United States a party to the compact nor does the consent of Congress guarantee the execution of the terms of the compact. "It simply declares its consent. . . . It leaves the compact as it was, that is, a compact between the two states and nothing more. . . ." *Id.* at pp. 583-4.

Twenty-one years later the Supreme Court decided *People v. Central Railroad,* 79 U.S. (12 Wall.) 455 (1872). In that case

New York and New Jersey had entered into an interstate compact to establish a boundary line between the two states. A dispute arose based upon the construction of that compact. In its brief decision the Supreme Court dismissed the case and held:

> The assent of Congress did not make the act giving it a statute of the United States, in the sense of the 25th section of the Judiciary Act. The construction of the Act was in no way drawn in question, nor has any title or right been set up under it and denied by the State Constitution. It had no effect beyond giving the consent of Congress to the compact between the two states. *Id.* at page 456.

In *Wharton v. Wise,* 153 U.S. 155, 14 S. Ct. 783, 38 L. Ed. 669 (1894) and *Wedding v. Meyler,* 192 U.S. 573, 24 S. Ct. 322, 48 L. Ed. 570 (1904) the Supreme Court, without directly addressing the issue of the effect of congressional consent on an interstate compact, provided interpretation of two interstate compacts. In *Wedding v. Meyler* the Supreme Court specifically relied upon *Wheeling and Belmont Bridge Company* to support its jurisdiction to construe the interstate compact.

In *Hinderlider v. La Plata River and Cherry Creek Ditch Company,* 304 U.S. 92, 58 S. Ct. 803, 82 L. Ed. 1202 (1938) the Court held that the assent of Congress to a compact between Colorado and New Mexico does not make it a treaty or statute of the United States within the meaning of §237(a) of the Judicial Code. In so holding it relied upon *People v. Central Railroad, supra.* In footnote 12 of that decision the Court noted that "the decisions are not uniform as to whether the interpretation of an interstate compact presents a federal question."

Until this time no clear decision had been handed down by this Court addressing the effect of congressional consent on an

interstate compact. The Court ruled definitively in *Delaware River Joint Tollbridge Commission v. Colburn,* 310 U.S. 419, 60 S. Ct. 1039, 84 L. Ed. 1287 (1940) wherein it was held that:

> In *People v. Central R.R.*, . . . jurisdiction of this Court to review a judgment of a state court construing a compact between states was denied on the ground that the Compact was not a statute of the United States in that the construction of the Act of Congress giving consent was in no way drawn in question, nor was any right set up under it. This decision has long been doubted, . . . and we now conclude that the construction of such a Compact sanctioned by Congress, by virtue of Article I, §10, Clause 3 of the Constitution, involves a federal "title, right, privilege or immunity" which "specially set up and claimed" in a state court may be reviewed here on certiorari under §237(b) of the Judicial Code, 28 U.S.C. §344. *Id.* at p. 427.

This issue was again addressed 19 years later in *Petty v. Tennessee — Missouri Bridge Commission,* 359 U.S. 275, 79 S. Ct. 785, 3 L. Ed. 2d 804 (1959). In that case a plaintiff sued an agency created by an interstate compact in federal court. The agency was a joint agency of the states of Tennessee and Missouri and therefore would normally have been immune from suit in federal court under the Eleventh Amendment to the United States Constitution. The interstate compact which created this agency however, specifically gave consent for this agency to sue and be sued. The Court was therefore confronted with the issue of whether this waiver of immunity from suit in state court also constituted a waiver of Eleventh Amendment immunity from suit in federal court. Citing the *Colburn* decision, the Court noted that congressional consent to the interstate compact provided federal

courts with the authority to construe that compact. The Court then held that the terms of the compact waived immunity from suit in state court and that congressional consent to the interstate compact constituted a waiver of immunity from suit in federal court. In a strong dissent by Justice Frankfurter and joined by Justices Harlan and Whittaker it was stated that:

> To imply from a congressional consent changes in the law of the compact states of merely local concern, such as dislodging a states policy on sueability for torts attributable to the administration of the bridge (while necessarily leaving unaffected the state's sueability for torts not attributable to its administration), would constitute a complete disregard of the purpose of the Constitution in requiring congressional consent to compacts. Such disregard would introduce a wholly irrational disharmony in the application of local policy. *Id.* at p. 289.

Justices Black, Clark and Stewart stated that they concurred in the majority judgment and opinion with the understanding that they would not reach the constitutional question as to whether the Eleventh Amendment immunizes from suit agencies created by two or more states under interstate compacts which the Constitution requires to be approved by Congress.

In *Petty,* clearly three justices believed that the consent of Congress to an interstate compact should not constitute positive and affirmative action as federal law. An additional three justices concurred in the result but believed that this constitutional question should not have been reached in that case.

The latest decision from this Court to address this issue was handed down in *Cuyler v. Adams,* 449 U.S. 433 (1981). This case

dealt with the construction of the Interstate Agreement on Detainers in relation to the Uniform Criminal Extradition Act. In addressing the initial question of whether the Court had jurisdiction to decide the question presented, the Court concluded that "the detainer agreement is a congressionally sanctioned interstate compact, the interpretation of which presents a question of federal law." 101 S. Ct. 703, 708-709. In a footnote to this case the Court discussed briefly the history of the interpretation of the Compact Clause from *People v. Central Railroad* through *Delaware River Joint Tollbridge Commission v. Colburn.*

Until this Court decided *Delaware River v. Colburn* in 1940 there had previously been vacillation as to the effect of congressional consent upon the status of an interstate compact. The doctrine laid out in *Colburn* was only that the *construction* of a compact sanctioned by Congress presents a federal question thereby giving federal courts jurisdiction to *construe* such compact and further that the *meaning* of a compact is a question on which the Supreme Court has the final say and *nothing more.* In *Petty* the Supreme Court went a short step further holding that the waiver by a state agency of immunity from suit in state court becomes a waiver of Eleventh Amendment immunity from suit in federal court upon congressional consent to an interstate compact. As noted above three justices disapproved of such a rule and an additional three justices would not have reached the question at all. The latest decision on this issue, *Cuyler v. Adams,* addressed this issue only as a threshold question. The *Cuyler* Court was initially concerned with whether it had jurisdiction to construe the interstate compact. Based upon the state of the law at that time it made the obviously correct decision that it had jurisdiction to interpret the compacts in question.

In a logical progression, the cases cited above lead to the present case. This Court had decided that the interpretation of an interstate compact is a question of federal law. That rule is

not at issue here; however, that rule was the basis for the holding of the Court of Appeals that the consent of Congress to an interstate compact transforms that compact into substantive federal law to the extent that a delegation of power under the compact constitutes a delegation of power by the federal government. As the Court of Appeals noted no prior court had gone so far as to make such a holding. That issue however, is now presented squarely before this Court and is ripe for decision.

This case does not present the first instance in which this issue has been raised. There is a great contrariety between compact as federal law for purposes of federal interpretation and a compact as federal law for purposes of making a positive grant of federal powers as might be done by legislative enactment. The distinction between the two was recognized in *Henderson v. Delaware River Joint Tollbridge Commission,* 66 A.2d 843, 362 Pa. 475 (1949), *cert. denied,* 338 U.S. 850. The *Henderson* court cited the rule of *People v. Central Railroad* that congressional consent does not make a compact federal law. The court also recognized the modification to this rule made in *Delaware River Joint Tollbridge Commission v. Colburn, supra.* The court found, however, that the rule of *Colburn* made a compact federal law only to give federal courts jurisdiction to hear contests involving the compact. The federal courts had jurisdiction to hear the case not because a statute of the United States was in question but because congressional sanction involved a federal right title privilege or immunity.

This issue has also been addressed in other federal circuits. In *League to Save Lake Tahoe v. Tahoe Regional Planning Agency,* 507 F.2d 517 (9th Cir. 1974), *cert. denied,* 240 U.S. 974 (1975), the Ninth Circuit Court of Appeals held that the District Court had jurisdiction under 28 U.S.C. §1331(a) to interpret an interstate compact. It reached this result by finding that congressional consent to an interstate compact made that compact federal law within the meaning of 28 U.S.C. §1331(a). That section

gives federal district courts jurisdiction to hear cases arising "under the Constitution, laws or treaties of the United States." The same result on the same issue was reached in *Utah International, Inc. v. Intake Water Company,* 484 F. Supp. 36 (D. Mont. 1979). It must again be noted that these cases dealt only with the question of whether the federal court had jurisdiction to interpret an interstate compact. These cases did not deal with the question of whether congressional consent to an interstate compact constitutes a positive delegation of federal power.

The issue raised in this case will become of increasing significance as sister states attempt to resolve joint problems by the use of interstate compacts. As outlined above the effect of congressional consent on an interstate compact has never been addressed by this Court to the extent presented in this case. The cases cited above illustrate that the facts of this case and the issue presented herein presents the next logical step in a progression of cases construing the Compact Clause. It is of special interest and importance that this Court now address this question of federal law which heretofore has not been settled by this Court.

This Court should also exercise its power of supervision because the Court of Appeals rendered its decision in conflict with decisions of this Court and gave approval to procedures which heretofore had been rendered constitutionally impermissible.

Essential to the condemnation of property under 40 U.S.C. §258(a) is the requirement that the United States pledge its credit for the payment of an award of just compensation over and above the amount deposited in the court. It is only by the pledge of the credit of the United States that a condemnor may secure immediate possession. In *Joslin Manufacturing Company v. Providence,* 262 U.S. 668, 43 S. Ct. 684, 67 L. Ed. 1167 (1923), this Court held:

> It has long been settled that the taking of property for public use by a state or one of its municipalities need not be accompanied or preceded by payment, but that the requirement of just compensation is satisfied when the public faith and credit are pledged to a reasonably prompt ascertainment and payment, and there is adequate provision for enforcing the pledge. *Id.* at p. 677.

In *Crozier v. Krupp,* 224 U.S. 290, 32 S. Ct. 488, 56 L. Ed. 771 (1912) the Supreme Court recognized the right of the United States to take possession of private property prior to the payment of just compensation but qualified this right by stating:

> . . . the duty to provide for payment of compensation may be adequately fulfilled by an assumption on the part of government of the duty to make prompt payment of the ascertained compensation — that is, by the pledge, either expressly or by necessary implication, of the public good faith to that end. *Id.* at p. 306.

In the case of WMATA no government either state or federal has pledged its credit to insure the payment of just compensation. Indeed §82(c) of the compact specifically provides that only WMATA will be responsible for the payment of just compensation. Section 82(c) provides:

> Any award or compensation for the taking of property pursuant to this title shall be made by the authority, and none of the signatory parties nor any other agency, instrumentality or political subdivision thereof shall be liable for such award or compensation.

Based upon the well-settled case law cited above, the landowner argued that it is constitutionally impermissible for WMATA to quick-take private property because it has specifically denied the public credit of any government, state or federal. The Court of Appeals recognized the proscription of the pledge of government credit and that WMATA's resources do not constitute the public credit. The Court of Appeals however countered this recognition and held that WMATA, which has the capacity to sue and be sued, owns substantial assets consisting of both personal and real property. Consequently the court suggested that the landowner may attach and have execution on WMATA's assets to satisfy any liability for the condemnation award. The court thereby placed upon the landowner the burden to present evidence that the payment of just compensation was not guaranteed and that WMATA owned insufficient unencumbered and unmortgaged assets to satisfy the judgment.

This holding is in direct conflict with the prior decisions of this Court. This Court has specifically held that a condemnor may take *immediate* possession of private property *only* if a pledge of the public faith and credit is given. There is no similarity between a pledge of public faith and credit and the existence of unencumbered assets upon which a landowner may attach and execute. When private property is taken for public use a landowner is entitled to just compensation not a collection suit. The opinion of the Court of Appeals was clearly in conflict with the decisions of this Court.

Additionally, the solvency of WMATA is not as great as the court suggests. As noted by the court, WMATA's resources to pay awards is limited because it has no taxing power and must rely instead on issuing revenue bonds, borrowing funds and receiving contributions. In actuality, WMATA's budget approaches the red much closer than it would admit.

In light of the important issue presented herein which has not heretofore been decided by this Court and in light of the holding of the Court of Appeals which is in conflict with prior decisions of this Court, this petition for certiorari should be granted in order to review and consider the questions presented.

II.

The constitutional requirements of just compensation are not satisfied when interest on the deficiency in a quick-take condemnation case is awarded at a rate below that which is earned by the court itself on the original deposit.

When WMATA filed its Declaration of Taking it deposited with the registry of the court $1,710,400 pursuant to the provisions of 40 U.S.C. §258(a). The court invested this initial deposit in United States Treasury Bills and continuously rolled these bills over resulting in an accumulated gain of $750,752.86. This is equivalent to an annual gain of 13.50566%.

The award of the Land Commission exceeded WMATA's initial deposit by $3,286,830. The court awarded interest on this deficiency at various rates from 8.73% per annum to 14.02% per annum which averaged a rate below that earned by the court's own investments. The court rejected the landowner's petition that the interest awarded should be computed at the rate of return realized on the funds initially deposited in the court or, in the alternative, to award compound interest.

It has long been held that when a condemnor condemns and takes possession of property before ascertaining or paying compensation, the landowner is entitled to an additional award which will "produce the full equivalent of that value paid contemporaneously with the taking." *Seaboard Airlines Railway*

Company v. United States, 261 U.S. 299, 306, 43 S. Ct. 354, 356, 67 L. Ed. 664 (1923). Interest on the original deposit has generally been considered to be a good measure by which to ascertain the amount to be added. The addition of interest is necessary so that an owner shall not suffer loss and so that the owner shall have the just compensation to which he is entitled. Interest which is awarded on a deficiency is not interest in a traditional sense but rather is a part of the landowner's just compensation. *United States v. Thayer-West Point Hotel Company*, 329 U.S. 585, 67 S. Ct. 398, 91 L. Ed. 521 (1947). *See also, Phelps v. United States*, 274 U.S. 341, 47 S. Ct. 611, 71 L. Ed. 1083 (1927); *United States v. Rogers*, 255 U.S. 163, 41 S. Ct. 281, 65 L. Ed. 566 (1921); *United States v. Blankinship*, 543 F. 2d 1272 (9th Cir. 1976).

40 U.S.C. §258(a) provides that the judgment of just compensation shall include as part of the just compensation awarded interest at the rate of 6% per annum. This provision echoes the pronouncements of this Court that interest on the deficiency shall be awarded. However, this Court has never construed §258(a) with regard to the nature and sufficiency of the 6% interest rate provided in §258(a). That issue is presented in this case and is now before the Court.

In *United States v. Blankinship, supra*, the Ninth Circuit Court of Appeals held that the 6% interest figure employed in the Declaration of Taking Act operates as a floor and is not a ceiling on the rate of interest to be paid on the deficiency in a condemnation case. This construction has been in most circuits where the issue has been raised. *United States v. 97.17 Acres of Land*, 511 F. Supp. 565 (D. Md. 1981). However, the courts appear to be divided as to the manner in which interest is to be computed. In *Pitcairn v. United States*, 547 F.2d 1106 (Ct. Cl. 1976), *cert. denied*, 434 U.S. 1051, 98 S. Ct. 903, 54 L. Ed. 2d 804 (1978) the Court of Claims based its annual interest rate on Moody's

Composite Index of Yields on Longterm Corporate Bonds. *See also, Georgia Pacific Corp. v. United States,* 640 F. 2d 328 (Ct. Cl. 1978); *Miller v. United States,* 620 F. 2d 812 (Ct. Cl. 1980). In the case at bar the District Court set its interest rate based on the formula used by the *Pitcairn* court and the Court of Appeals upheld this determination. It found that compounding interest was not an appropriate method of setting the amount of interest to be awarded on the deficiency. Other circuits however have disagreed with this. In *United States v. 319.46 Acres of Land,* 508 F. Supp. 288 (W.D. Oklahoma 1981) it was held that the interest to be paid on a condemnation deficiency is to be compound interest. As that court realistically pointed out:

> The economic reality is simply that if the full value for just compensation had been deposited with the Court contemporaneously with the Declaration of Taking, the landowner would have been able to earn compound interest. Thus prohibiting the landowner from recovering compound interest on the deficiency acts to retroactively reduce the value of just compensation at the time of the taking by undervaluing its present worth. 503 F. Supp. 288, 291.

The Ninth Circuit has also adopted this position. As was held in *United States v. 429.59 Acres of Land,* 612 F.2d 459 at 465 (1980), "compounding of interest is appropriate to compensate the landowners for the loss of use of the interest that the deficiency award would have been producing for them during the interim."

This Court has held that interest on the deficiency shall be awarded as a part of just compensation. The various federal circuits however, appear to be in disagreement as to the manner in which the interest shall be computed. In *Almota Farmers Elevator and Warehouse Company v. United States,* 409 U.S.

470, 473-474, 93 S. Ct. 791, 35 L. Ed. 2d 1 (1973), the Court stated that just compensation is defined as "the full monetary equivalent of the property taken. The owner is to be put in the same position monetarily as he would have occupied if his property had not been taken." Consequently, when the court sets a rate of interest to be awarded it is attempting to place the landowner in the same position monetarily as he would have occupied if his property had not been taken.

The case at bar presents an opportunity for this Court to clarify the manner in which a rate of interest is to be determined. The District Court had before it the figures of the rate of return earned by the investments of the court itself. There can be no more accurate means of determining interest than by relying on that which is directly before the court. Certainly had the landowner been paid the full monetary equivalent of the property taken at the time of the initial deposit the landowner could have invested the money in the manner in which the court invested the monies. In good conscience and equity the rate of return on the landowner's just compensation payment should be no less than the return on money held in the registry of the court.

In order to clarify the existing disputes between the various circuits on this issue, this Court should hear and determine the issue presented which has heretofore been undecided.

CONCLUSION

The issues presented in this case are of constitutional dimension and have yet to be decided by this Court. The effect of congressional consent on an interstate compact has never been addressed to the extent presented by this case. The increased utilization of interstate compacts as a vehicle for solving joint problems of sister states necessitates that this issue be decided in a definitive manner. Additionally, the wide mosaic of formulas used for determining rates of interest by various circuits requires that this dispute be settled in a definitive decision by this Court.

WHEREFORE, petitioner respectfully urges this Court to grant certiorari and to hear and consider the important issues presented in this case.

Respectfully submitted,

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Attorneys for Petitioner

APPENDIX

RELEVANT CONSTITUTIONAL AND CODE PROVISIONS

Article I, §10, cl. 3 of the United States Constitution reads:

No State shall, without the Consent of Congress, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.

40 U.S.C. §258a reads:

In any proceeding in any court of the United States outside of the District of Columbia which has been or may be instituted by and in the name of and under the authority of the United States for the acquisition of any land or easement or right of way in land for the public use, the petitioner may file in the cause, with the petition or at any time before judgment, a declaration of taking signed by the authority empowered by law to acquire the lands described in the petition, declaring that said lands are thereby taken for the use of the United States. Said declaration of taking shall contain or have annexed thereto-

(1) A statement of the authority under which and the public use for which said lands are taken.

(2) A description of the lands taken sufficient for the identification thereof.

(3) A statement of the estate or interest in said lands taken for said public use.
(4) A plan showing the lands taken.
(5) A statement of the sum of money estimated by said acquiring authority to be just compensation for the land taken.

Upon the filing [of] said declaration of taking and of the deposit in the court, to the use of the persons entitled thereto, of the amount of the estimated compensation stated in said declaration, title to the said lands in fee simple absolute, or such less estate or interest therein as is specified in said declaration, shall vest in the United States of America, and said lands shall be deemed to be condemned and taken for the use of the United States, and the right to just compensation for the same shall vest in the persons entitled thereto; and said compensation for the same shall be ascertained and awarded in said proceeding and established by judgment therein, and the said judgment shall include, as part of the just compensation awarded, interest at the rate of 6 per centum per annum on the amount finally awarded as the value of the property as of the date of taking, from said date to the date of payment; but interest shall not be allowed on so much thereof as shall have been paid into the court. No sum so paid into the court shall be charged with commissions or poundage.

Upon the application of the parties in interest, the court may order that the money deposited in the court, or any part thereof, be paid forthwith for or on account of the just compensation to be awarded in said proceeding. If the compensation finally awarded in respect

of said lands, or any parcel thereof, shall exceed the amount of the money so received by any person entitled, the court shall enter judgment against the United States for the amount of the deficiency.

Upon the filing of a declaration of taking, the court shall have power to fix the time within which and the terms upon which the parties in possession shall be required to surrender possession to the petitioner. The court shall have power to make such orders in respect of encumbrances, liens, rents, taxes, assessments, insurance, and other charges, if any as shall be just and equitable.

Article XVI, §82 of the WMATA Compact, codified in Maryland as Transportation Article, §10-204, Ann. Code of Md. reads:

(a) The Authority shall have the power to acquire by condemnation, whenever in its opinion it is necessary or advantageous to the Authority to do so, any real or personal property or any interest therein, necessary or useful for the transit system authorized herein, except property owned by the United States, by a signatory, or any political subdivision thereof, whenever such property can not be acquired by negotiated purchased at a price satisfactory to the Authority.

(b) Proceedings for the condemnation of property in the District of Columbia shall be instituted and maintained under the Act of December 23, 1963 (77 Stat. 577-581, D.C. Code 1961, Supp. IV, §§1351-1368). Proceedings for the condemnation of property located elsewhere within the zone shall be instituted and maintained, if applicable, pursuant to the

provisions of the Act of August 1, 1888, as amended (25 Stat. 357, 40 U.S.C. 257) and the Act of June 25, 1948 (62 Stat. 935 and 937, 28 U.S.C. 1935 and 1403) or any other applicable act; provided, however, that if there is no applicable federal law, condemnation proceedings shall be in accordance with the provisions of the state law of the signatory in which the property is located governing condemnation by the highway agency of such state. Whenever the words "real property", "realty", "land", "easement", "right-of-way", or words of similar meaning are used in any applicable federal or state law relating to procedure, jurisdiction and venue, they shall be deemed, for the purposes of this title, to include any personal property authorized to be acquired hereunder.

(c) Any award or compensation for the taking of property pursuant to this title shall be paid by the Authority, and none of the signatory parties nor any other agency, instrumentality or political subdivision thereof shall be liable for such award or compensation.

490 F. Supp. 1328 (D. Md. 1980)

WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY, Plaintiff,

v.

ONE PARCEL OF LAND IN MONTGOMERY COUNTY, MARYLAND, Virginia Casey Visnich et al. and Unknown Owners, Defendants.

ORDER

SHIRLEY B. JONES, District Judge.

The Court has considered the Memorandum and Order filed by the United States Magistrate dated July 3, 1979. Additionally, the Court has considered the transcript of the hearing before the Magistrate as well as the Memorandum of Points of Law, Facts and Authorities filed by the defendant Visnich in the appeal from the Magistrate's Order denying her Motion to Vacate the Declaration of Taking. Local Rule 81(f). It is this 4th day of June, 1980, by the United States District Court for the District of Maryland,

ORDERED;

1) That the Memorandum and Order of the Magistrate is accepted by the Court and is adopted by the Court in all respects; [1]

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1. *See also U. S. Steel Corp. v. Multistate Tax Comm'n*, 434 U.S. 452, 98 S.Ct. 799, 54 L.Ed.2d 682 (1978)

2) That defendant Visnich's appeal from that Memorandum and Order is hereby DENIED; and

3) That the Clerk of Court shall mail copies of this Order, along with the Memorandum and Order attached hereto, to all counsel of record.

MEMORANDUM AND ORDER

FREDERIC N. SMALKIN, United States Magistrate.

I.

On May 12, 1978, a complaint and a declaration of taking were filed pursuant to 40 U.S.C. § 258a [1] on behalf of the Washington

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1. In any proceeding in any court of the United States outside of the District of Columbia which has been or may be instituted by and in the name of and under the authority of the United States for the acquisition of any land or easement or right of way in land for the public use, the petitioner may file in the cause, with the petition or at any time before judgment, a declaration of taking signed by the authority empowered by law to acquire the lands described in the petition, declaring that said lands are thereby taken for the use of the United States. Said declaration of taking shall contain or have annexed thereto—

(1) A statement of the authority under which and the public use for which said lands are taken.

(2) A description of the lands taken sufficient for the identification thereof.

(3) A statement of the estate or interest in said lands taken for said public use.

(4) A plan showing the lands taken.

(5) A statement of the sum of money estimated by said acquiring authority to be just compensation for the land taken.

Upon the filing said declaration of taking and of the deposit in the court, to the use of the persons entitled thereto, of the amount of the estimated compensation stated in said declaration, title to the said lands in fee simple absolute, or such less estate or interest therein as is specified in said declaration, shall vest in the United States of America, and said lands shall be deemed to be condemned and taken for the use of the United States, and the right to just compensation for the same shall vest in the persons entitled thereto; and said compensation shall be ascertained and awarded in said proceeding and established by judgment therein, and the said judgment shall include, as part of the just compensation awarded, interest at the rate of 6 per centum per annum on the amount finally awarded as the value of the property as of the date of taking, from said date to the date of payment; but interest shall not be allowed on so much thereof as shall have been paid into the court. No sum so paid into the court shall be charged with commissions or poundage.

Upon the application of the parties in interest, the court may order that the money deposited in the court, or any part thereof, be paid forthwith for or on account of the just compensation to be awarded in said proceeding. If the compensation finally awarded in respect of said lands, or any parcel thereof, shall exceed the

Metropolitan Area Transit Authority (WMATA) for the condemnation of the defendant's fee simple interest in a parcel of real estate located in Montgomery County, Maryland. The public use for which the property was to be taken was "the construction, maintenance and operation of a rapid rail system and related facilities necessary or useful in rendering transit service, or in activities incidental thereto, all as provided in the Act of November 6, 1966, 80 Stat. 1324." Also filed on May 12, 1978 was a Motion for Delivery of Possession. On May 15, 1978, Judge Harvey signed an order granting WMATA immediate possession of a portion of the subject parcel while granting the defendant nine months and thirty days to surrender to WMATA the remaining portion of that parcel. The defendant Visnich filed an answer to the complaint on June 16, 1978. On July 19, 1978, this Court

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amount of the money so received by any person entitled, the court shall enter judgment against the United States for the amount of the deficiency.

Upon the filing of a declaration of taking, the court shall have power to fix the time within which and the terms upon which the parties in possession shall be required to surrender possession to the petitioner. The court shall have power to make such orders in respect of encumbrances, liens, rents, taxes, assessments, insurance, and other charges, if any, as shall be just and equitable.

entered an Order appointing commissioners pursuant to Fed.R.Civ.P. 71A(h) to fix the amount of compensation in the present action, but, before such compensation could be fixed, the defendant Visnich filed a Motion to Vacate the Declaration of Taking. A hearing on that motion was held before me on May 14, 1979, the disposition of all pretrial and discovery matters having been referred to me by *en banc* order of this Court dated September 6, 1978. For reasons stated hereinafter, defendant's motion must be denied.

II.

Defendant's contention that the declaration of taking is invalid is based, essentially, on the theory that "quick-take" condemnation of property in Maryland is *ultra vires* the condemnation power of WMATA. Article III, Section 40, of the Constitution of Maryland provides:

> The General Assembly shall enact no Law authorizing private property, to be taken for public use, without just compensation, as agreed upon between the parties, or awarded by a Jury, being *first* paid or tendered to the party entitled to such compensation. (Emphasis added.)

Since this Maryland constitutional provision apparently prohibits the sort of advance taking ("quick-take") condemnation proce-

dures being utilized by the plaintiff in this and other WMATA condemnation actions arising in Maryland, defendant Visnich argues that, insofar as it derives its condemnation power from the Maryland General Assembly's assent to the interstate compact creating it, WMATA is powerless to utilize quick-take in Maryland.

Pursuant to the requirements of Article I, Section 10, Clause 3 of the United States Constitution, Congress consented to the compact among Maryland, Virginia, and the District of Columbia creating WMATA. Public Law 86–794, 74 Stat. 1031, as amended by Public Law 87–767, 76 Stat. 764 and Public Law 89–774, 80 Stat. 1324. With regard to WMATA's condemnation powers and procedures, this compact provides, at 80 Stat. 1351:

> Proceedings for the condemnation of property in the District of Columbia shall be instituted and maintained under the Act of December 23, 1963 (77 Stat. 577–581, D.C. Code 1961, Supp. IV, Sections 1351–1368). Proceedings for the condemnation of property located elsewhere within the Zone shall be instituted and maintained, if applicable, pursuant to the provisions of the Act of August 1, 1888, as amended (25 Stat. 357, 40 U.S.C. 257) and the Act of June 25, 1948 (62 Stat. 935

and 937, 28 U.S.C. 1358 and 1403) or any other applicable Act; provided, however, that if there is no applicable Federal law, condemnation proceedings shall be in accordance with the provisions of the State law of the signatory in which the property is located governing condemnation by the highway agency of such state.

The plaintiff maintains that the WMATA compact has itself become federal law by the consent of Congress to its provisions and, therefore, the afore-quoted compact provision incorporates the quick-take provisions of 40 U.S.C. § 258a as "applicable federal law." The federal statute allowing "quick-take" would, thus, under the plaintiff's theory, override the Maryland constitutional prohibition.

Only a handful of cases on the issue of whether Congressional consent transforms an interstate compact into federal law have reached the Supreme Court and the holdings of the Court have been contradictory. The first case to reach that Court, *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 54 U.S. (13 How.) 518, 14 L.Ed. 249 (1852), involved a suit by Pennsylvania to halt construction of a bridge by defendant over the Ohio River at Wheeling, Virginia (as it was then) under a nuisance theory. The parties had agreed that the bridge would have to be in derogation of either state or federal

law to constitute a nuisance. Since the Virginia legislature had approved the bridge, there was obviously no violation of state law. Pennsylvania therefore had to show a violation of federal statute in order to be successful. Toward this end, Pennsylvania cited the Virginia-Kentucky Compact of 1789, which prohibited the obstruction of the Ohio River. The Court held: "This compact, by the sanction of Congress, has become a *law of the Union.*" *Id.* at 565–66. A later case, *People v. Central R.R.*, 79 U.S. (12 Wall.) 455, 20 L.Ed. 458 (1872), involved the State of New York's attempt to bring before the Court a case involving an agreement between New York and New Jersey.[2] Justice Chase wrote: "The assent of Congress did not make the act giving it [*i. e.*, the assent] a statute of the United States, in the sense of the 25th section of the Judiciary Act . . . . It had no effect beyond giving the consent of Congress to the compact between the two States." *Id.* at 456. A writ of error was therefore dismissed.

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2. The Judiciary Act of 1789, as amended in 1867, permitted a writ of error for review of state court decision "where any title, right, privilege, or immunity is claimed under the constitution, or any treaty or statute of or commission held or authority exercised under the United States." Act of Feb. 5, 1867, ch. 28, § 2, 14 Stat. 386.

A law review article has found it noteworthy that briefs submitted to the Court for the *Central R.R.* case failed to cite *Wheeling*, and the opinion of the Court also failed to mention that earlier case. Engdahl, *Construction of Interstate Compacts: A Questionable Federal Question*, 51 Va.L. Rev. 987, 996 (1965). In addition, the language of the Court in *Central R.R.* says only that the *act giving Congress' consent* does not become a "statute of the United States" and does not say that compact itself does not become federal law.

In the next "compact" case before the Supreme Court, the *Central R.R.* case was ignored. In *Wedding v. Meyler*, 192 U.S. 573, 24 S.Ct. 322, 48 L.Ed. 570 (1904), the 1789 compact between Virginia and Kentucky was also at issue. The facts in that case were as follows: Defendant was served with Indiana process on a steamboat operating on the Ohio River, which flows between Indiana and Kentucky. After obtaining a favorable judgment in Indiana, the plaintiffs then sued on that judgment in Kentucky. After the Kentucky Court of Appeals ordered the actions dismissed, plaintiffs sought a writ of error from the Supreme Court, alleging denial of full faith and credit to the Indiana judgment. Defendant argued that Kentucky's denial of full faith and credit was justified because

the Kentucky jury found that the defendant was served on the Kentucky side of the river, out of the jurisdiction of Indiana. Plaintiff argued, however, that Indiana had concurrent jurisdiction over the river with Kentucky under the 1789 compact. Although Indiana was not a state at the time of the 1789 compact, the Court cited language in the compact with granted Kentucky jurisdiction over the Ohio river "concurrent only with states which may possess the opposite shores of said river," and concluded that the compact encompassed Indiana. The Court went on to cite the *Wheeling* case for the proposition that the assent of Congress to the compact made the compact a law of the Union. *Id.* at 582–83.

A frequently cited case in this field is *Delaware River Joint Toll Bridge Commission v. Colburn*, 310 U.S. 419, 60 S.Ct. 1039, 84 L.Ed. 1287 (1940), which reviewed the case law in the area to that date. In pertinent part, that case held:

> In *People v. Central Railroad*, . . . jurisdiction of this Court to review a judgment of a state court construing a compact between states was denied on the ground that the Compact was not a statute of the United States and that the construction of the Act of Congress giving consent was in no way drawn in question, nor was any right set up under it. *This decision has long been doubted* . . .

> and we now conclude that the construction of such a compact sanctioned by Congress by virtue of Art. I, § 10, Clause 3 of the Constitution, involves a federal "title, right, privilege or immunity" which when "specially set up and claimed" in a state court may be reviewed here on certiorari. . . . (Citations omitted and emphasis added.)

Id. at 427, 60 S.Ct. at 1040. Although few commentators agree on the exact meaning of the *Colburn* decision, it appears that the Court relied on the "law of the Union doctrine." The respondent in *Colburn* argued that the *Central R.R.* case had overruled that doctrine, but the Court specifically rejected *Central R.R.* in its decision. Further, an earlier case, *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 58 S.Ct. 803, 82 L.Ed. 1202 (1938) ignored the law of the Union doctrine and, citing the *Central R.R.* case, searched instead through the compact to determine whether its subject matter presented a question of federal common law. Since *Hinderlider* involved the diversion of river waters running interstate, the Supreme Court agreed to hear the case. *Id.* at 110, 58 S.Ct. at 810. Petitioner in *Colburn* cited *Hinderlider* to the Court as an alternative theory on which it could base its decision. The *Colburn* court limited its rule, however, to compacts "sanctioned by Congress." 310 U.S. at 427, 60 S.Ct. at 1040. The law of the Union doctrine would

require such a limitation, but petitioner's "federal common law" doctrine did not. In support of its holding, the *Colburn* court cited directly to the *Wheeling* and *Wedding* cases. *Id.* at 427–28, 60 S.Ct. at 1040–41. This lends further support for a law of the Union slant in the *Colburn* decision. The cited law review article claims that the law of the Union slant to *Colburn* has been rejected in "nearly every quarter," 51 Va. L.Rev., at 1006, but the same article claims that those who so reject such an interpretation frequently do so based on *Hinderlider*. The sole authority for *Hinderlider*, however, was the *Central R.R.* case, which was itself overruled by *Colburn*.

In the 1959 case of *Petty v. Tennessee-Missouri Bridge Commission*, 359 U.S. 275, 79 S.Ct. 785, 3 L.Ed.2d 804 (1959), the compact in question contained a clause allowing the compact commission to be sued. The courts in one compact state held that identical language in other statutes did not amount to a waiver of sovereign immunity, and cases from the other party state indicated it would take a similar position. The plaintiff sued under the Jones Act in the United States District Court, claiming that the defendant's negligence resulted in her husband's death. The issue presented to the Supreme Court was whether the immunity which the interstate agency might otherwise claim had been waived by the com-

pact provisions. To this the Court answered in the affirmative. Justice Douglas wrote for the Court:

> The construction of a compact sanctioned by Congress under Art. I, § 10, cl. 3, of the Constitution presents a federal question. . . . [Citing *Colburn.*] Moreover, the meaning of a compact is a question on which this Court has the final say. . . . [Citing *Dyer v. Sims*, 341 U.S. 22, 71 S.Ct. 557, 95 L.Ed. 713.] . . . Of course, when the alleged basis of waiver of the Eleventh Amendment's immunity is a state statute, the question to be answered is whether the State has intended to waive its immunity. . . . [Citation omitted.] But where the waiver is, as here, claimed to arise from a compact between several States, the Court is called on to interpret not unilateral state action but the terms of a consensual agreement, the meaning of which, because made by different States acting under the Constitution and with congressional approval, is a question of federal law. . . . [Citing *Colburn.*]

Id. at 278–79, 79 S.Ct. at 788 (footnote omitted). In footnote 4 of the opinion, Justice Douglas wrote that "[w]hile we show deference to state law in construing a compact, state law as pronounced in prior adjudications and rulings is not binding." *Id.* at

278 n.4, 79 S.Ct. at 788. The Maryland Court of Special Appeals, in *State v. Boone*, 40 Md.App. 41, 46, 388 A.2d 150, 153 (1978) seemed to accept this view when it wrote that "[a]lthough the Supreme Court is not the final arbitrator of state statutes, it is the final arbitrator of interstate compacts."[3]

This Court concludes, therefore, that the assent of Congress to the WMATA compact has had the effect of making that compact federal law, which supersedes the Maryland constitutional prohibition upon quick take. *See McCulloch v. Maryland*, 4 Wheat. 316, 17 U.S. 316, 4 L.Ed. 579 (1819). Consequently, as Judge Murray of this Court held in *Washington Metropolitan Area Transit Authority v. One Parcel of Land in Montgomery County, Maryland, Marvin J. Goldman et al., and unknown owners*, No. HM 77-1306 (D.Md. April 7, 1978):

> [t]he compact language of any other applicable act allows the inference that the Compact not only leaves room for but calls for the application of other federal condemnation acts and other federal proceedings ancillary to the condemnation such as Section 258a, which is merely a "quick-take" provision that can be uti-

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3. This case involved the Interstate Agreement on Detainers.

> lized only when there is a proceeding for condemnation taking place under another federal condemnation statute.

Id. at 15. Section 258a therefore governs procedure when WMATA seeks possession of and title to property prior to the final condemnation judgment.

It must be noted that even if the WMATA compact were not considered as federal law and, instead, state law were applied pursuant to the provisions of § 82(b) of the Compact, the result in this case would be the same. In the absence of applicable federal law, § 82(b) dictates that state law governing condemnation by the highway agency of the state in which the property is located shall control. The applicable state law in the instant case is Article III, § 40B [4]

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4. The General Assembly shall enact no law authorizing private property to be taken for public use without just compensation, to be agreed upon between the parties or awarded by a jury being first paid or tendered to the party entitled to such compensation, except that where such property in the judgment of the State Roads Commission is needed by the State for highway purposes, the General Assembly may provide that such property may be taken immediately upon payment therefor to the owner or owners thereof by said State Roads Commission, or into Court, such amount as said State Roads Commission shall estimate to be of the fair value of said property, provided such legislation also requires the payment of any further sum that may subsequently be awarded by a jury. (1941, ch. 607, ratified Nov. 3, 1942).

of the Constitution of Maryland, which allows the State Roads Commission [5] to exercise quick-take condemnation procedures when, in its judgment, such property is needed by the state for highway purposes. The Maryland constitution, itself, therefore, provides an independent, legally sufficient basis for the legality of WMATA's use of quick-take procedures. Accordingly, defendant's Motion to Vacate the Declaration of Taking must be denied.

In accordance with the foregoing opinion, it is this 3rd day of July, 1979, by the United States District Court for the District of Maryland, ORDERED:

1. That defendant's Motion to Vacate the Declaration of Taking BE, and the same hereby IS, DENIED; and

2. That the Clerk of Court inform counsel of the entry of the foregoing Memorandum and Order.

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5. Now the State Highway Administration.

FINAL JUDGMENT AND ORDER OF JUST COMPENSATION

Pursuant to the Court's Memorandum and Order of October 13, 1981, and to the Court's oral ruling of December 11, 1981, it is hereby

ADJUDGED AND ORDERED that the just compensation payable by the plaintiff for the taking filed herein is the sum of Four Million, Nine Hundred Ninety-Seven Thousand, Two Hundred Three Dollars and No Cents ($4,977,203.00) and judgment is hereby entered against the Washington Metropolitan Area Transit Authority (hereinafter referred to as W.M.A.T.A.) in the aforesaid amount.

IT IS FURTHER ORDERED that plaintiff, having deposited the estimated just compensation of $1,170,400.00 into the registry of the Court on May 12, 1978, there remains a deficiency of $3,286,803.00 in the amount of just compensation due the landowner.

IT IS FURTHER ORDERED that interest on the aforesaid deficiency is due the defendant as follows:

YEAR	INT.RATE	NO. DAYS	INTEREST
1978	8.73%	233 from 5/13/78	$183,168.58
1979	9.63%	365	$316,519.13
1980	11.94%	365	$392,444.28
1981	14.02% (until paid)	310 through 11/6/81	$391,372.68

Interest on the deficiency is hereby awarded to defendant in the amount of $1,283,496.60 through November 6, 1981, and interest on the deficiency shall continue to accure at the rate of 14.02 percent ($1,262.49 per day) until paid.

June 7, 1982
DATE

/s/Shirley B. Jones
JUDGE

Consented to (as to form):

WASHINGTON METROPOLITAN AREA
TRANSIT AUTHORITY

BY: /s/ Robert H. Plotkin
ROBERT H. PLOTKIN
Attorney, Department of Justice
Land and Natural Resources Division
9th and Pennsylvania Avenue, N. W.
Washington, D. C. 20530
724-6871

VIRGINIA CASEY VISNICH

BY: _____
R. EDWIN BROWN, ESQUIRE
Attorney for Defendant
Brown and Sturm
Post Office Box 511
Rockville, Maryland 20850

706 F. 2d 1312 (4th Cir. 1983)

WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY, a body corporate, Appellee,

v.

ONE PARCEL OF LAND In MONTGOMERY COUNTY, MARYLAND, et al., and Unknown Owners, (parcel MA 408) and F.O. Day Company, Defendants,

and

Virginia Casey Visnich, Appellant.

No. 82-1166.

United States Court of Appeals, Fourth Circuit.

Argued Feb. 8, 1983.

Decided May 4, 1983.

HARRISON L. WINTER, Chief Judge:

Virginia Casey Visnich appeals from the judgment of the district court ruling that the Washington Metropolitan Area Transit Authority ("WMATA") acted properly in condemning her property under the Declaration of Taking Act, 40 U.S.C. § 258a, and setting an award of interest on the amount of just compensation. We conclude that WMATA properly exercised condemnation powers delegated to it by the federal

government, and that the district court acted within its discretion in fixing the rate of interest on the award. We therefore affirm the judgment.

I.

In order to provide for the development of a coordinated mass transit system in the Washington, D.C. metropolitan area, the District of Columbia, Maryland, and Virginia, at the urging of Congress,[1] negotiated the Washington Metropolitan Area Transit Authority Compact ("Compact").[2] The Compact was enacted into state law by Maryland, *see* Ch. 869, Acts of General As-

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1. *See* National Capital Transportation Act of 1960 § 301(a), 74 Stat. 537 (1960) (intention "to promote and encourage the solution of problems of a regional character in the National Capital region by means of an interstate compact entered into by the State of Maryland, the Commonwealth of Virginia and the Board of Commissioners of the District of Columbia, with the consent of Congress"). A federal representative attended the negotiations. *See* H.R.Rep. No. 1914, 89th Cong., 2d Sess. 4 (1966).

2. The WMATA Compact was actually an amendment to the Washington Metropolitan Area Transit Regulation Compact, previously enacted by the participants and consented to by Congress. *See* Pub.L. No. 86-794, 74 Stat. 1031 (1960), as amended by Pub.L. No. 87-767, 76 Stat. 764 (1962).

sembly 1965, and Virginia, *see* Ch. 2, 1966 Acts of Assembly. Congress then enacted the compact for the District of Columbia. *See* Pub.L. No. 89-774, 80 Stat. 1324 (1966), *reprinted at* [1966] U.S.Code Cong. & Ad. News 1547-79.[3] That enactment also constituted congressional consent to the Compact, pursuant to the Compact Clause of the United States Constitution, which provides that "[n]o State shall, without the Consent of Congress, . . enter into any Agreement or Compact with another State . . . ." U.S. Const. art. I, § 10, cl. 3.

Section 4 of the Compact created WMATA as an instrumentality and agency of each of the signatory parties—the District of Columbia, Maryland, and Virginia. Its Board of Directors is composed of two representatives from each of the signatories. As set forth in the Compact, WMATA's purposes are "to plan, develop, finance, and cause to be operated improved transit facilities, in coordination with transportation and general development planning for the [metropolitan] Zone, as part of a balanced regional system of transportation." In carrying out those purposes, WMATA has,

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3. The bill was, after approval by both Houses of Congress, signed by the President.

among others, the power to sue and be sued and to acquire, own, and convey real and personal property necessary or useful in rendering transit service. Although most of its funds are supposed to come from operating revenues, WMATA is empowered to issue revenue bonds, borrow money from lending institutions, and mortgage or pledge its properties and revenues; remaining funding may be provided by the states, District, and federal government. WMATA is not permitted however, to acquire any property, make any commitments, or incur any obligations unless funds are presently available to cover such expenses.

Of particular relevance to the present case, the Compact also establishes and defines the Authority's powers of property condemnation. Section 82 of the Compact provides:

> (a) The Authority shall have the power to acquire by condemnation . . . any real or personal property . . . .
>
> (b) Proceedings for the condemnation of property in the District of Columbia shall be instituted and maintained under the Act of December 23, 1963 (77 Stat. 577–581, D.C.Code 1961, Supp. IV, Sections 1351–1368). Proceedings for the condemnation of property located elsewhere within the Zone shall be instituted and maintained, if applicable, pursuant to the provisions of the Act of August 1,

1888, as amended (25 Stat. 357, 40 U.S.C. 257) and the Act of June 25, 1948 (62 Stat. 935 and 937, 28 U.S.C. 1358 and 1403) or any other applicable Act; provided, however, that if there is no applicable Federal law, condemnation proceedings shall be in accordance with the provisions of the State law of the signatory in which the property is located governing condemnation by the highway agency of such state. . . .

(c) Any award or compensation for the taking of property pursuant to this Title shall be paid by the Authority, and none of the signatory parties nor any other agency, instrumentality or political subdivision thereof shall be liable for such award or compensation.

II.

On May 12, 1978, WMATA filed a complaint and declaration of taking in the district court, condemning certain property, located in Montgomery County, Maryland, owned by appellant Virginia Casey Visnich. WMATA purported to proceed under the "quick-take" condemnation procedures specified by 40 U.S.C. § 258a, the Declaration

of Taking Act.[4] Pursuant to those procedures, WMATA deposited into the registry of the court its estimate of the property's value, $1,710,400, and took immediate title

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4. The full text of § 258a follows:

In any proceeding in any court of the United States outside of the District of Columbia which has been or may be instituted by and in the name of and under the authority of the United States for the acquisition of any land or easement or right of way in land for the public use, the petitioner may file in the cause, with the petition or at any time before judgment, a declaration of taking signed by the authority empowered by law to acquire the lands described in the petition, declaring that said lands are thereby taken for the use of the United States. Said declaration of taking shall contain or have annexed thereto--

(1) A statement of the authority under which and the public use for which said lands are taken.

(2) A description of the lands taken sufficient for the identification thereof.

(3) A statement of the estate or interest in said lands taken for said public use.

(4) A plan showing the lands taken.

(5) A statement of the sum of money estimated by said acquiring authority to be just compensation for the land taken.

Upon the filing said declaration of taking and of the deposit in the court, to the use of the persons entitled thereto, of the amount of the estimated compensation stated in said declaration, title to the said lands in fee simple absolute, or such less estate or interest

therein as is specified in said declaration, shall vest in the United States of America, and said lands shall be deemed to be condemned and taken for the use of the United States, and the right to just compensation for the same shall vest in the persons entitled thereto; and said compensation shall be ascertained and awarded in said proceeding and established by judgment therein, and the said judgment shall include, as part of the just compensation awarded, interest at the rate of 6 per centum per annum on the amount finally awarded as the value of the property as of the date of taking, from said date to the date of payment; but interest shall not be allowed on so much thereof as shall have been paid into the court. No sum so paid into the court shall be charged with commissions or poundage.

Upon the application of the parties in interest, the court may order that the money deposited in the court, or any part thereof, be paid forthwith for or on account of the just compensation to be awarded in said proceeding. If the compensation finally awarded in respect of said lands, or any parcel thereof, shall exceed the amount of the money so received by any person entitled, the court shall enter judgment against the United States for the amount of the deficiency.

Upon the filing of a declaration of taking, the court shall have power to fix the time within which and the terms upon which the parties in possession shall be required to surrender possession to the petitioner. The court shall have power to make such orders in respect of encumbrances, liens, rents, taxes, assessments, insurance, and other charges, if any, as shall be just and equitable.

to, and possession of, the property.[5]

On March 19, 1979, the owner filed a motion to vacate the declaration of taking and for return of the property, arguing that WMATA did not have the authority to quick-take property under § 258a, but instead could take title to and possession of the property only after payment of judicially-determined just compensation. The magistrate denied this motion, and his denial was affirmed by the district court, 490 F.Supp. 1328. The case was then referred to a Land Commission, pursuant to Fed.R. Civ.P. 71A, in order to fix an award of just compensation. In its report of May 29, 1981, the Commission recommended that Visnich be awarded $4,997,203 as just compensation for the value of her property at the time it had been taken. This recommendation was adopted by the district court, leaving a shortfall of $3,286,803 between the amount that WMATA had deposited into court at the time of the taking and the amount awarded by the district court. Visnich petitioned the district court for an

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5. Such a procedure was also followed in *WMATA v. One Parcel of Land, No. HM 77-1306* (D.Md. filed April 7, 1978), *aff'd*, 599 F.2d 1050 (4 Cir.1979) (unpublished), *cert. denied*, 444 U.S. 1072, 100 S.Ct. 1016, 62 L.Ed.2d 754 (1980).

award of interest on this amount in excess of the nominal six percent annual rate established by § 258a. The magistrate fixed the interest rate at 8.73% for 1978, 9.63% for 1979, 11.94% for 1980, and 14.02% for 1981; this too was affirmed by the district court, and final judgment was entered.

On appeal before us, Visnich argues, first, that WMATA did not have the authority to quick-take her property under § 258a, and, second, that the interest rate set by the district court was insufficient to provide just compensation.

III.

We turn first to the propriety of WMATA's use of quick-take condemnation procedures. Not being a sovereign, WMATA of course has no inherent condemnation powers of its own.[6] It is also clear, however, that the federal or state governments may delegate their condemnation power to lesser agencies such as WMATA.[7] The landowner's argument, therefore, is that any delegation of condemnation powers to

6. *See* 1 Nichols on Eminent Domain §§ 1-14 (rev. 3d ed. 1981).

7. *See id.* §§ 3.1[2], 3.21; *Oakland Club v. South Carolina Public Service Authority*, 110 F.2d 84 (4 Cir.1940) (federal condemnation power delegated to state agency).

WMATA was limited to normal (i.e., taking title and possession only after payment of the judicially-determined amount) condemnation, and did not include quick-take powers.

The parties seem to agree that quick-take condemnation power could not have been granted by Maryland, because the Maryland state constitution provides that:

> The General Assembly shall enact no Law authorizing private property, to be taken for public use, without just compensation, as agreed upon between the parties, or awarded by a Jury, being paid first or tendered to the party entitled to such compensation.

Md. Const. art. III, § 40. Although article III, section 40B of the Maryland Constitution permits the State Roads Commission to use quick-take powers, such use is limited to condemnation "for highway purposes."

The magistrate and district court concluded, however, that WMATA had been delegated quick-take condemnation powers by the federal government. They reasoned that congressional consent to the WMATA Compact, pursuant to the Compact Clause, had transformed the Compact into substantive federal law that delegated federal quick-take powers to WMATA. In reviewing this judgment, we must consider: first did the Compact become a federal law;

second, if so, was it intended by Congress to delegate affirmative federal powers and was it a proper legislative device to accomplish that purpose; and third, if so, were those powers intended by Congress to include quick-take condemnation powers and were they delegated in a way that constitutionally reached that result?

A.

The first question is whether congressional consent pursuant to the Compact Clause created federal law, which of course would be a prerequisite to the delegation of federal power, or instead simply consented to a joining of state power. Resolution of this question is guided, we think, by the Supreme Court's recent decision in *Cuyler v. Adams*, 449 U.S. 433, 101 S.Ct. 703, 66 L.Ed.2d 641 (1981), announced after the decision of the district court. In *Cuyler*, a Pennsylvania state court had interpreted the Interstate Agreement on Detainers, an interstate compact consented to by Congress, as providing no right to a pretransfer hearing. The question presented to the Supreme Court was whether federal courts were bound by that interpretation because the state court had interpreted state law, or whether they could give their own interpretations because congressional consent to the Agreement had transformed it into federal law. The Court held that the test for

whether an interstate compact becomes federal law is whether it "is a congressionally sanctioned interstate compact within Art. I, § 10, of the Constitution." *Id.* at 439, 101 S.Ct. at 707. Not all interstate agreements require congressional consent, however; "[w]here an agreement is not 'directed to the formation of any combination tending to the increase of political power in the States, which may encroach upon or interfere with the just supremacy of the United States,' it does not fall within the scope of the Clause and will not be invalidated for lack of congressional consent." *Id.* at 440, 101 S.Ct. at 707. Nor will a compact become federal law simply because Congress, in an excess of caution, enacts consent legislation.[8] "But where Congress has authorized the States to enter into a cooperative agreement, and where the subject matter of that agreement is an appropriate subject for congressional legislation,[9] the consent of Congress transforms the States' agreement into federal law under the Compact Clause." *Id.* Applying this two-part test,

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8. *See United States Steel Corp. v. Multistate Tax Comm'n*, 434 U.S. 452, 471, 98 S.Ct. 799, 811, 54 L.Ed.2d 682 (1978) (the "historical practice" of submitting multistate agreements "for congressional approval . . ., which may simply reflect considerations of caution and convenience on the part of the submitting States, is not controlling").

the Court found that Congress had passed the Crime Control Consent Act of 1934, giving its consent to an interstate compact in this area, and that Congress had the power to legislate in this area, under both the Commerce Clause and the Extradition Clause. Therefore, the Agreement "is a congressionally sanctioned interstate compact the interpretation of which presents a question of federal law." *Id.* at 442, 101 S.Ct. at 708.

Applying the *Cuyler* test here, there is, of course, no dispute that Congress enacted a law consenting to the WMATA Compact. *See* Pub.L. No. 89-774, 80 Stat. 1324 (1966), *reprinted* at [1966] U.S.Code Cong. & Ad.News 1547-79. Nor can there be any doubt that this was an appropriate area for federal legislation.[16] WMATA is charged with developing and operating a mass transit system for the District of Columbia and the surrounding Maryland and Virginia suburbs. As such, WMATA's ac-

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9. We note that there is an area of overlap where both of these tests will be met: state agreements whose subject matter is appropriate for federal legislation but which do not threaten to increase the political power of the states at the expense of the federal government. Within this area, apparently, a compact that does not receive congressional consent will not be invalidated for lack of consent, but a compact that is consented to by Congress will thereby become federal law.

tivities have a substantial impact on interstate commerce and are appropriate for congressional legislation under the Commerce Clause, U.S. Const. art. I, § 8, cl. 3. In addition, WMATA's powers to construct and operate a mass transit system primarily located in the District of Columbia undoubtedly fall within congressional jurisdiction to legislate for the District of Columbia, U.S. Const. art. I, § 8, cl. 17.[11] We conclude, therefore, that the two-part test from *Cuyler* is satisfied here, and that the WMATA Compact became federal law when consented to by Congress.

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10. The landowner argues that the test to be applied is whether the Compact tends to increase the political power of the states at the expense of the federal government. As noted above, *supra* note 9, the Supreme Court held in *Cuyler*, 449 U.S. at 440, 101 S.Ct. at 707, that the issue of whether an interstate compact becomes federal law is resolved by determining whether it was consented to by Congress and whether its subject matter is an appropriate subject for congressional legislation. The "political power" test is limited to determining whether compacts not consented to by Congress are invalid for lack of that consent.

11. The mere fact of participation by the District of Columbia in an interstate compact, however, is not enough to transform the compact into federal law: the District's participation in the compact at issue in *Cuyler* was not cited by the Court as a factor in its decision.

B.

The second sequential question is whether the Compact, as federal law, was intended by Congress to delegate any affirmative federal condemnation power and was a proper legislative means to accomplish that purpose. As to the first half of this question, the language of § 82(b) of the WMATA Compact explicitly evidences a congressional intent that federal condemnation powers be employed by WMATA: condemnation proceedings in Maryland and Virginia are to be instituted in federal court pursuant to 40 U.S.C. § 257 or "any other applicable Act." Section 257 authorizes condemnation proceedings by the United States whereby title and possession of the property are taken after the payment of judicially determined just compensation; the Compact thus explicitly reveals the intent of Congress, in consenting to the Compact, that at least some federal condemnation powers be delegated to WMATA.

As to the second half of this question, the landowner suggests that, as a matter of constitutional law, congressional consent transforms an interstate compact into federal law for purposes of interpretation only, and not to the extent of delegating through the compact affirmative federal powers. She argues that *Cuyler* and its predecessors merely recognized that interstate compacts

must be subject to federal interpretation because there will be no neutral state forum for interpreting the compact; questions regarding the compact's meaning and the states' obligations thereunder are likely to arise only in the signatory states, and therefore a disinterested federal forum is necessary for a resolution to which all signatories must accede.[12] *See West Virginia ex rel. Dyer v. Sims*, 341 U.S. 22, 28, 71 S.Ct. 557, 560, 95 L.Ed. 713 (1951). Visnich argues that the Supreme Court's recognition of the necessity of a neutral interpretation binding on the signatory states does not justify the further step of finding that an interstate compact is substantive federal law that, simply by the fact of congressional consent, can delegate federal powers.

We think, however, that the Supreme Court's opinions in this area do far more than the landowner would admit. First, in *Cuyler* itself, the Court held that the Interstate Agreement on Detainers is substantive federal law whose violation may be remedied by an action under 42 U.S.C. § 1983. *See* 449 U.S. at 450, 101 S.Ct. at 712. Analogously, this Circuit has previously held that the Interstate Agreement on

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12. Such compliance is mandated, of course, by the Supremacy Clause, once the compact is ruled a law of the United States. U.S. Const. art. VI.

Detainers should be considered a law of the United States whose violation is grounds for habeas corpus relief under 28 U.S.C. § 2254. *See Bush v. Muncy*, 659 F.2d 402, 407 (4 Cir.1981), *cert. denied*, 455 U.S. 910, 102 S.Ct. 1259, 71 L.Ed.2d 449 (1982). Second, the Court has held that a federal forum and federal injunctive powers will be available to enforce an interstate compact. In *Pennsylvania v. The Wheeling and Belmont Bridge Co.*, 54 U.S. (13 How.) 518, 14 L.Ed.2d 249 (1852), Pennsylvania sued a Virginia company building a bridge over the Ohio River, seeking to enjoin construction as a nuisance. The company defended on the ground that the bridge had been authorized by the Virginia legislature, and that no federal law overrode that state enactment. But the Supreme Court rejected this contention, holding that the Virginia-Kentucky Compact of 1789, which as consented to by Congress agreed that the use and navigation of the Ohio River would remain free and open to all, had become binding federal law which a state could not disobey. *Id.* at 565–66, 14 L.Ed.2d 249. Therefore, a federal remedy existed for violation of the compact. *Id.*[13] Third, the

13. *See also League to Save Lake Tahoe v. Tahoe Regional Planning Agency*, 507 F.2d 517 (9 Cir.1974) (federal district court has jurisdiction over case requesting issuance of injunction to comply with an interstate compact), *cert. denied*, 420 U.S. 974, 95 S.Ct. 1398, 43 L.Ed.2d 654 (1975).

Court has held that a state court cannot declare an interstate compact to be invalid on state constitutional grounds without subjecting that normally unreviewable decision of state law to further Supreme Court review in order to protect the federal interest and the interests of the other signatories. *See West Virginia ex rel. Dyer v. Sims*, 341 U.S. 22, 71 S.Ct. 557, 95 L.Ed. 713 (1951).

These cases suggest that congressionally sanctioned interstate compacts implicate federal and interstate interests, in whose furtherance and protection federal remedial powers will be available and inconsistent state laws will be deemed unenforceable. It is true that no prior case goes so far as to hold that consent may constitute delegation of federal power to the authority created by the compact. But, in the present case, there is a clear federal and interstate interest in WMATA's ability to use quick-take condemnation powers. Were construction to be commenced only after entry of a final judgment fixing an award of just compensation, the goal of rapid and coordinated development of a mass transit system would be frustrated. Moreover, as discussed above, the plain language of § 82(c) of the Compact shows that Congress knew, and intended, that federal condemnation powers and procedures would be used by WMATA. We see no reason why this intent should be frustrated simply

because it is expressed in consent legislation rather than in an "affirmative" Act; each requires a majority vote of both houses of Congress and the signature of the President. We conclude, therefore, that congressional consent to the WMATA Compact should be deemed to have delegated federal condemnation powers.

C.

The third sequential question is whether the delegation of federal condemnation powers to WMATA was intended to include quick-take condemnation, and whether the quick-take scheme thus delegated satisfied the "just compensation" clause. We think that by including WMATA's right to proceed under "any other applicable Act" in addition to 40 U.S.C. § 257, Congress intended to delegate quick-take powers to WMATA.[14] This interpretation is strongly suggested by the stated congressional goal of rapid and coordinated development and construction of the transit system. *See* [1966] U.S.Code Cong. & Ad. News 1547. Moreover, interpreting the

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14. *See also Washington Metropolitan Area Transit Authority v. Goldman*, No. HM 77-1306 (D.Md. filed Apr. 7, 1978) (also reaching this conclusion), *aff'd*, 599 F.2d 1050 (4 Cir.1979) (unpublished), *cert. denied*, 444 U.S. 1072, 100 S.Ct. 1016, 62 L.Ed.2d 754 (1980).

phrase to mean quick-take condemnation under § 258a is the most logical way to give meaning to that phrase.[15]

As to whether the quick-take powers delegated to WMATA satisfy the constitutional requirement of just compensation, the landowner contends that because under § 82(c) of the Compact neither the federal government nor any state has pledged its good faith and credit to the payment of the eventual just compensation award, and liability is limited to WMATA itself, there is no constitutionally adequate just compensation.

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15. This is so because the Compact indicates that proceedings are to be filed under § 257 "or any other applicable Act"; § 258a, the quick-take provision, is the other principal procedural mechanism for federal condemnations.

Visnich contends that § 258a should not be implied because that section applies only to proceedings instituted "by and in the name of and under the authority of the United States." This objection is dispelled by section 4 of the consent legislation, *see* [1966] U.S.Code Cong. & Ad.News 1579, which states that "[a]ll laws or parts of laws of the United States and the District of Columbia inconsistent with the provisions of Title III of this Act are hereby amended for the purpose of this Act to the extent necessary to eliminate such inconsistencies and to carry out the provisions of this Act."

In *Sweet v. Rechel*, 159 U.S. 380, 16 S.Ct. 43, 43 L.Ed.2d 188 (1895), the Supreme Court first addressed the question of under what (if any) conditions a state may, consistent with the just compensation clause of the federal constitution, exercise state quick-take condemnation powers. In resolving this question, the Court quoted from *Bloodgood v. Mohawk & H.R. Co.*, 18 Wend. 9, 31 Am.Sec. 313, in which the Chancellor had written:

> It certainly was not the intention of the framers of the constitution to authorize the property of a citizen to be taken and actually appropriated to the use of the public, and thus to compel him to trust to the future justice of the legislature to provide him a compensation therefor. The compensation must be either ascertained and paid to him before his property is thus appropriated, or an appropriate remedy must be provided, and on an appropriate fund; whereby he may obtain such compensation through the medium of the courts of justice if those whose duty it is to make such compensation refuse to do so.... The public purse, or the property of the town or county upon which the assessment is to be made, may justly be considered an adequate fund.

159 U.S. at 405–06, 16 S.Ct. at 50–51. Turning to the case before it, the Court

noted that the state law provided that "payment [is] assured, if necessary, by a decree against the city which would be effectively enforced," *id.* at 407, 16 S.Ct. at 51; this, said the Court, was "certain and adequate." *Id.*

The Supreme Court returned to this question in *Crozier v. Fried. Krupp Aktiengesellschaft*, 224 U.S. 290, 32 S.Ct. 488, 56 L.Ed. 771 (1912), in the context of whether the government could quick-take licenses on patented items. The standard applied by the Court was:

> always having reference to the nature and character of the property taken, its value and the surrounding circumstances, the duty to provide for the payment of compensation may be adequately fulfilled by an assumption on the part of the government of the duty to make prompt payment of the ascertained compensation, —that is, by the pledge, either expressly or by necessary implication, of the public good faith and credit.

Id. at 306, 32 S.Ct. at 492. The Court upheld the license-taking statute, as it provided for the "pledge of good faith of the government . . . to appropriate and pay the compensation when ascertained." *Id.* at 307, 32 S.Ct. at 492.

The final Supreme Court pronouncement in this area was *Joslin Mfg. Co. v. Providence*, 262 U.S. 668, 43 S.Ct. 684, 67 L.Ed.

1167 (1923), wherein a municipal water control board had quick-taken land to expand the water supply. The Court defined its test for quick-takes:

> It has long been settled that the taking of property for public use by a state or one of its municipalities need not be accompanied or preceded by payment, but that the requirement of just compensation is satisfied when the public faith and credit are pledged to a reasonably prompt ascertainment and payment, and there is adequate provision for enforcing the pledge.

Id. at 677, 43 S.Ct. at 688. Because the Rhode Island statute provided that the landowner could have execution of any judgment issued against the city, the Court upheld the taking. We note as well that the continuing vitality of these standards has recently been reaffirmed. *See Allain-Lebreton Co. v. Department of the Army*, 670 F.2d 43, 45 (5 Cir.1982); *Vazza v. Campbell*, 520 F.2d 848, 850 (1 Cir.1975); *Johns v. Dallas*, 380 F.Supp. 754 (N.D.Tex.) (three-judge court), *aff'd mem.*, 419 U.S. 1042, 95 S.Ct. 614, 42 L.Ed.2d 637 (1974).

The WMATA Compact, however, makes no pledge of the federal faith and credit and explicitly proscribes a pledge of the credit of Maryland, Virginia, and the District of Columbia for just compensation liabilities incurred by WMATA's condemna-

tion activities. Instead, section 82(c) of the Compact indicates that WMATA is to bear all such liabilities. WMATA's resources to pay these awards are limited, however, because it has no taxing power and must instead rely on issuing revenue bonds, borrowing funds in anticipation of operating revenues, and receiving contributions, if any, from the signatories and the federal government. Clearly none of this constitutes the public credit. It is true that under section 22 of the Compact WMATA is not permitted to incur liabilities until sufficient funds are available to pay those expenses. But the present case demonstrates the inadequacy of that guarantee; WMATA estimated that it was spending $1.7 million to condemn appellant's property when it was actually spending almost $5 million.

Notwithstanding WMATA's inability to pledge the public credit, we think that constitutionally adequate just compensation is guaranteed. Under § 12(a) of the Compact, WMATA has the ability to be sued, and § 82(c) of the Compact specifically sanctions such liability.[16] When this is combined with the admitted and uncontestable fact that WMATA owns very substan-

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16. In addition, of course, WMATA's filing under 40 U.S.C. § 258a vests the right to compensation in the landowner.

tial assets, we think that just compensation is, to a virtual certainty, guaranteed. The record itself reveals that the mass transit facilities now being built on Visnich's property are merely part of an extension to already-existing lines. We also take judicial notice of the fact that the existing mass transit system in Washington, owned by WMATA, consists of very substantial personal and real property.[17] We think it clear, therefore, that were WMATA not to pay any just compensation award, the landowner could attach, and have execution on, sufficient WMATA assets to satisfy the liability. It is true that WMATA is permitted under the Compact to mortgage any and all of its assets, but the landowner has produced no evidence that insufficient unencumbered assets exist whereby the judgment could be satisfied.[18] We thus hold that WMATA has been delegated federal quick-take condemnation authority and that its use of such authority satisfied the constitu-

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17. Section 3(b) of the WMATA consent legislation provided for the transfer to WMATA of substantial real and personal property and other assets by the President.

18. We need not at this time, therefore, decide whether a landowner would have any remedy should the Authority prove to be unable to pay a just compensation award or appear to be unable to pay such an award at the time of taking.

tional requirements of the Fifth and Fourteenth Amendments' "just compensation" guarantee.

The landowner's final argument is that if the WMATA Compact is construed so as to permit quick-take condemnation, Maryland violated its state constitution in joining the Compact. As noted above, article III, section 40 of the Maryland Constitution prohibits the legislature from enacting laws authorizing private property to be taken for public purpose without the prior payment of just compensation.

We see no merit in this argument. First, the Court of Appeals of Maryland held in *Dutton v. Tawes*, 225 Md. 484, 500, 171 A.2d 688, 695–96 (1961), that the Maryland legislature's "power to make a contract by statute, that is to say, a compact, with a sister state, is a power inherent in sovereignty limited only by the requirement of Congressional consent under Art. I, Sec. 10, of the Constitution of the United States."[19] Second, we think that the Maryland Constitution's prohibition against laws authorizing quick-take condemnation merely with-

19. In *Dutton*, an interstate compact between Maryland and Virginia had established a joint commission to regulate the conduct of Marylanders on the Potomac River. A Maryland citizen alleged that the Maryland legislature's delegation to the commission of legislative and police powers violated the Maryland Constitu-

draws from the state the power of quick-take condemnation that, as a sovereign, it would otherwise possess;[20] the prohibition does not, however, bar Maryland from exercising that power when delegated to it by the federal government.[21] We thus hold that Maryland was not barred by its constitution from entering into the Compact.

The judgment of the district court upholding WMATA's use in this case of quick-take condemnation powers under 40 U.S.C. § 258a is therefore correct.

IV.

As noted above, the shortfall between the amount deposited by the Authority into the registry of the court at the time of taking and the final just compensation award was

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tion. But the court rejected this challenge, as quoted in the text, holding that the power to enter into interstate compacts is inherent in Maryland's authority.

20. *See Lore v. Board of Public Works*, 277 Md. 356, 358, 354 A.2d 812 (1976); *Riden v. Philadelphia, Baltimore and Washington RR Co.*, 182 Md. 336, 339, 35 A.2d 99 (1943).

21. This interpretation is also suggested by *West Virginia ex rel. Dyer v. Sims*, 341 U.S. 22, 30–32, 71 S.Ct. 557, 561–562, 95 L.Ed. 713 (1951), which indicated that state constitutional provisions should be construed, if possible, so as to permit continued state participation in the interstate compact.

$3,286,803. The deposit was made on May 12, 1978, and the final judgment entered on May 29, 1981. The government concedes that although the Declaration of Taking Act, 40 U.S.C. § 258a, provides for interest at a 6% per annum rate on any deficiency, that figure is merely a floor on the allowable interest. *See United States v. Blankinship*, 543 F.2d 1272, 1275–76 (9 Cir.1976). Visnich contends that the annual interest rate should not be less than the 13.5% that the court clerk achieved on the deposited funds by investing them in United States Treasury bills. The district court, however, based its annual interest rate on Moody's Composite Index of Yields on Long Term Corporate Bonds.

The choice of an appropriate rate of interest is a question of fact, to be determined by the district court, *see id.* at 1276, and the district court's judgment will be upset only if it reaches a clearly erroneous result. In fixing an award of interest, the district court should attempt to determine what "a reasonably prudent person investing funds so as to produce a reasonable return while maintaining safety of principal" would have achieved. *United States v. 429.54 Acres of Land*, 612 F.2d 459, 465 (9 Cir.1980). We think that use of the Moody's index yielded an award that satisfactorily approximates that return. More-

over, we note that this method has been endorsed by the Court of Claims. *See Pitcairn v. United States*, 547 F.2d 1106 (Ct.Cl. 1976), *cert. denied*, 434 U.S. 1051, 98 S.Ct. 903, 54 L.Ed.2d 804 (1978). We therefore see no reason to disturb the judgment of the district court fixing the rate of interest on the just compensation deficiency.[22]

AFFIRMED.

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22. In similar vein, we think that the district court did not exceed its discretion in declining to compound the interest allowance.

No. 83-214

In the Supreme Court of the United States

OCTOBER TERM, 1983

ONE PARCEL OF LAND IN MONTGOMERY COUNTY, MARYLAND, ET AL., PETITIONERS

v.

WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether congressional consent to the interstate compact creating the Washington Metropolitan Transit Authority was a constitutional delegation of authority to use the Federal Declaration of Taking Act, 40 U.S.C. 258a.

2. Whether the district court made a clearly erroneous determination of the amount of interest due the landowner in this case.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 25a-53a) is reported at 706 F.2d 1312. The opinion of the district court (Pet. App. 6a-21a) is reported at 490 F. Supp. 1328.

JURISDICTION

The judgment of the court of appeals was entered on May 4, 1983. The petition for a writ of certiorari was filed on August 1, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioners seek review of the judgment entered in a condemnation case brought by Washington Metropolitan Area Transit Authority ("WMATA") to acquire land for the construction and operation of the Washington metropolitan area rapid transit system. On May 21, 1978,

WMATA filed a complaint in condemnation and a declaration of taking condemning certain property located in Montgomery County, Maryland, which was owned by Virginia C. Visnich ("the landowner"). As required by the Declaration of Taking Act, 40 U.S.C. 258a, WMATA deposited in the registry of the court the estimated value of the property as just compensation. The landowner filed a motion to vacate the declaration of taking and for return of the property on the ground that WMATA did not have authority to condemn property under the Federal Declaration of Taking Act, but only had authority to condemn under the general condemnation statute, 40 U.S.C. 257. The magistrate's denial of this motion was affirmed by the district court.

The case was then referred to a commission, pursuant to Fed. R. Civ. P. 71A, which recommended as just compensation an amount in excess of WMATA's initial deposit in the registry of the court. The commission's recommendation was accepted by the district court. The landowner petitioned the district court for an award of interest in excess of the statutory rate of 6% provided in 40 U.S.C. 258a on the amount by which the actual award of just compensation exceeded WMATA's initial deposit.[1] The magistrate awarded interest in excess of the statutory rate by setting annual interest rates for each year during the period in question based on Moody's Composite Index of Yields on Long Term Corporate Bonds.[2] The magistrate's award of interest was affirmed by the district court.[3]

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[1]The landowner specifically requested that interest be awarded at the rate which the initial deposit with the court had actually earned, *i.e.*, 13.5%.

[2]The magistrate set annual interest rates as follows: 1978 at 8.73%; 1979 at 9.63%; 1980 at 11.94%; and January 1981 to date of payment at 14.02%.

[3]The district court rejected the landowner's further argument that if the magistrate's award of interest were utilized, it should be compounded.

The court of appeals affirmed both the district court's denial of the motion to vacate the declaration of taking and its award of interest on the deficiency. The court of appeals first held that congressional consent to the interstate compact creating WMATA transformed the compact into federal law (Pet. App. 38a). It held further that Congress intended to delegate authority to utilize federal condemnation procedures, including 40 U.S.C. 258a (Pet. App. 42a), and that that delegation satisfied the constitutional requirements of just compensation (Pet. App. 48a-50a). Turning to the interest question, the court of appeals held that "[t]he choice of an appropriate rate of interest is a question of fact, to be determined by the district court" which "will be upset only if it reaches a clearly erroneous result" (Pet. App. 52a). Finding that the selection of annual rates based on Moody's Index approximates the return which a reasonably prudent person would receive if the funds were invested so as to produce a reasonable return while maintaining safety of principal (Pet. App. 52a), the court of appeals concluded that the district court's award of interest using Moody's Index should not be disturbed.

ARGUMENT

The decision of the court of appeals is correct, does not conflict with any decision of this Court or any other court of appeals, and does not warrant review by this Court.

1. Petitioners argue (Pet. 5-15) that WMATA does not have the authority to condemn property under the Federal Declaration of Taking Act, 40 U.S.C. 258a.

a. Petitioners primarily argue that congressional consent to an interstate compact transforms the compact into federal law only to the extent that such consent gives federal courts jurisdiction to interpret the compact. That position is clearly inconsistent with this Court's holding in *Cuyler* v. *Adams*, 449 U.S. 433 (1981). In holding that the Interstate

Agreement on Detainers is "an interstate compact approved by Congress and is thus a federal law subject to federal rather than state construction" (449 U.S. at 438), the Court made the effect of congressional consent to compacts within the Compact Clause unmistakably clear:

> Because congressional consent transforms an interstate compact within this Clause into a law of the United States, we have held that the construction of an interstate agreement sanctioned by Congress under the Compact Clause presents a federal question.

Ibid. Congressional consent does not merely make "the interpretation of an interstate compact * * * a question of federal law" as petitioners suggest (Pet. 10); instead, its interpretation is a federal question precisely *because* congressional consent transforms the compact into federal law. As the court of appeals observed (Pet. App. 40a), *Cuyler* itself belies petitioners' interpretation of this Court's position. In *Cuyler*, this Court held that the Interstate Agreement on Detainers was a substantive federal law whose violation may be remedied by an action under 42 U.S.C. 1983. 449 U.S. at 450. See also *Texas* v. *New Mexico*, No. 65, Orig. (June 17, 1983), slip op. 9 (congressional consent effects "metamorphosis" of interstate compact into federal law).

Petitioners are correct in observing (Pet. 6) that no prior case has held that congressional consent to a compact effects a delegation of federal power to the authority created by the compact. However, that fact alone does not justify an exercise of certiorari jurisdiction, since the decision below is simply a correct application of this Court's holdings in *Cuyler* and other cases, and is completely consistent with the decisions of other courts of appeals on the effect of congressional consent to interstate compacts. See *Texas* v. *New Mexico, supra* (no court may order relief inconsistent

with compact terms unless compact itself is unconstitutional); *Pennsylvania* v. *Wheeling and Belmont Bridge Co.*, 54 U.S. (13 How.) 518 (1851) (federal remedy exists for violation of congressionally sanctioned compact); *West Virginia ex rel, Dyer* v. *Sims*, 341 U.S. 22 (1951) (state court determination that interstate compact invalid on state constitutional ground subject to Supreme Court review); *League to Save Lake Tahoe* v. *Tahoe Regional Planning Agency*, 507 F.2d 517 (9th Cir. 1974), cert. denied, 420 U.S. 974 (1975) (federal court has jurisdiction to issue injunction requiring compliance with interstate compact); *United States ex rel. Esola* v. *Groomes*, 520 F.2d 830 (3d Cir. 1975) (Interstate Agreement on Detainers is law of the United States, the violation of which is grounds for *habeas corpus* relief); *Echevarria* v. *Bell*, 579 F.2d 1022 (7th Cir. 1978) (same).

The holding of the court of appeals is mandated by the federal and interstate interests in WMATA's ability to exercise the federal declaration of taking power. The compact creating WMATA was initiated at the urging of Congress to provide mass rapid transit in the Washington metropolitan area. Although most of that transit system is in the District of Columbia, significant parts of it run into Maryland and Virginia. WMATA's actions thus have a substantial impact on interstate commerce and would have been an appropriate area for affirmative legislative action, even if the District of Columbia were not a signatory.[4] Moreover, Congress clearly intended WMATA to exercise federal condemnation powers when it consented to the compact that

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[4]Article I, Section 8, Clause 17 of the U.S. Constitution gives Congress the authority "[t]o exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States * * *."

granted WMATA the authority to condemn property "pursuant to the provisions of * * * [40 U.S.C. 257] or any other applicable act." Section 82(b), WMATA Compact (80 Stat. 1351). The court of appeals was obviously correct in holding that there was "no reason why this intent should be frustrated simply because it is expressed in consent legislation rather than in an affirmative Act" (Pet. App. 42a-43a).

b. Petitioners also argue (Pet. 12-15) that the court's holding that WMATA is authorized to use the Declaration of Taking Act is inconsistent with this Court's decisions and amounts to an approval of unconstitutional procedures since WMATA has not pledged public faith and credit for payment of an award of just compensation (Pet. 12-14).

We note initially that the issue here involves only payment of any shortfall between estimated just compensation and the eventual award by the district court, because the Declaration of Taking statute requires WMATA to deposit the estimated amount of just compensation with the district court at the time of filing the declaration of taking. Moreover, petitioners do not suggest that there was any difficulty in this case in recovering the shortfall between the amount deposited with the district court and the district court's eventual award.

Contrary to petitioners' contention (Pet. 14), this Court has never held that a pledge of public credit is necessary to make the exercise of "quick take" authority constitutional.[5] When this Court first addressed the constitutionality of this

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[5]The cases cited by petitioner stand instead for the proposition that an assumption on the part of the government of the duty to make prompt payment of the ultimate award of just compensation is one way in which "the duty to provide for payment of compensation may be adequately fulfilled," *Crozier* v. *Krupp*, 224 U.S. 290, 306 (1912), or "the requirement of just compensation * * * satisfied." *Joslin Manufacturing Co.* v. *Providence*, 262 U.S. 668, 677 (1923).

type of procedure, it held that if compensation is not paid before the property is appropriated

> an appropriate remedy must be provided, and upon an adequate fund; whereby [the landowner] may obtain such compensation through the medium of the courts of justice if those whose duty it is to make such compensation refuse to do so.

Sweet v. *Rechel*, 159 U.S. 380, 406 (1895) quoting *Bloodgood* v. *Mohawk and Hudson Rail Road Co.*, 18 Wend. 9, 18 (N.Y. 1837)). In its most recent pronouncement, this Court held that

> the taking of property for public use by a State or one of its municipalities need not be accompanied or preceded by payment, but that the requirement of just compensation is satisfied when the public faith and credit are pledged to a reasonably prompt ascertainment and payment, and there is adequate provision for enforcing the pledge.

Joslin Manufacturing Co. v. *Providence*, 262 U.S. 668, 677 (1923).

The court of appeals properly applied these tests to this case. WMATA is not a federal or state agency, but is a unique creature created by interstate compact. That compact requires, in Section 82(c), that WMATA must bear all liabilities incurred as a result of its condemnation activities (80 Stat. 1351). As a result, it may not pledge any public credit to payment of just compensation. Nevertheless, as the court of appeals recognized, there is "an appropriate remedy," *Sweet* v. *Rechel, supra*, 159 U.S. at 406, and "an adequate fund" (*ibid.*) whereby just compensation could be obtained if WMATA refused to pay any deficiency between the estimated amount of just compensation deposited with the court and the actual award. WMATA's filing under 40

U.S.C. 258a vests the right to compensation in the landowner. Section 82(c) of the compact specifically states that any award for property condemned shall be paid by the Authority. WMATA may sue and be sued (Section 12(a), WMATA Compact (80 Stat. 1328)), and owns substantial assets, which a landowner could attach to satisfy any judicially determined liability. Accordingly, the constitutional requirements of just compensation are met, for in the words of the court of appeals, "just compensation is, to a virtual certainty, guaranteed" (Pet. App. 49a).

2. Petitioners also argue (Pet. 15-18) that in order to fulfill the requirements of just compenstion, the district court was requried to award interest on any shortfall between the initial deposit with the court and the actual award at a rate at least equal to the rate that the landowner earned on the initial deposit while it was held by the court.[6] Petitioners' argument is without merit.

a. Petitioners incorrectly characterize (Pet. 16) the issue before the Court as one requiring a construction of "the nature and sufficiency of the 6% interest rate" that 40 U.S.C. 258a provides shall be paid on any shortfall. The district court awarded the landowner interest on the shortfall at varying annual rates between 8.7% and 14% — all of which were well above the 6% statutory rate. The question that is properly before this Court is thus whether courts may employ any reasonable formula in calculating what interest on a shortfall meets the requirement of just compensation.

b. Petitioners imply (Pet. 17) that the district court's award of interest in this case is in conflict with decisions of other courts of appeals. This is simply incorrect. In fact, the

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[6]At the request of the landowner, the district court ordered the clerk to invest the deposit in the registry of the court in 90-day Treasury bills. As the bills became due, the funds were reinvested. The interest thus earned was equivalent to an annual rate of 13.5% (Pet. 4).

district court faithfully applied a method for determining interest adopted by the Court of Claims in *Pitcairn* v. *United States*, 547 F.2d 1106 (Ct. Cl. 1976), cert. denied, 434 U.S. 1051 (1978), and followed by that court in subsequent cases. See *Tektronix, Inc.* v. *United States*, 575 F.2d 832, 836 (Ct. Cl.), cert. denied, 439 U.S. 1048 (1978); *Miller* v. *United States*, 620 F.2d 812, 838-840 (Ct. Cl. 1980). This method uses simple interest rates based on changes in investment yields using Moody's Composite Index of Yields on Long Term Corporate Bonds. The court of appeals correctly held that use of this method justly compensated the landowner (Pet. App. 52a-53a).

A different method for determining interest rates on shortfalls has been endorsed by the Court of Appeals for the Ninth Circuit. *United States* v. *Blankinship*, 543 F.2d 1272 (9th Cir. 1976). However, in *United States* v. *429.59 Acres of Land, et al. (Imperial Beach)*, 612 F.2d 459, 465 (9th Cir. 1980), that court explained that an interest rate is appropriate if it is equivalent to what " 'a reasonably prudent person investing funds so as to produce a reasonable return while maintaining safety of principal' would receive."[7] The Ninth Circuit also approved compounding of interest in *Imperial Beach*, in order to reach fair compensation in that case; it did not suggest that compounding is always required.[8]

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[7]The *Imperial Beach* court emphasized that "*United States* v. *Blankinship* * * * does not require the application of any fixed formula for interest rate determinations in condemnation cases." 612 F.2d at 465.

[8]In *Imperial Beach*, simple interest of 6.635% was compounded to arrive at a rate equivalent to 7.4% simple interest. Similarly, *United States* v. *319.46 Acres, Situate in Cotton and Jefferson Counties*, 508 F. Supp. 288 (W.D. Okla. 1981), relied on by petitioner, approved the compounding of an interest rate of 8.48%. In no case in which compounding has been approved has the Court of Claims' formula been used.

Clearly, courts have endorsed different methods for determining an interest rate that will result in fair and just compensation. However, the choice of different methods does not represent a conflict among the circuits and does not merit review by this Court.

c. Petitioners' further argument (Pet. 18) that the district court was required to award the landowner the same interest rate which she received on the original deposit in the registry of the court does not warrant consideration by this Court. No court has ever held that just compensation is determined simply by looking to the *actual* interest earned by a landowner's investments during the period within which just compensation is being determined. Thus, the district court's refusal to use that rate is entirely consistent with established principles used to determine just compensation. The district court's judgment that awarded the landowner interest at rates ranging annually from 8.7% to 14.02% clearly approximated the return to be expected by " 'a reasonably prudent person investing funds so as to produce a reasonable return while maintaining safety of principal,' " *Imperial Beach, supra*, 612 F.2d at 465. That award was thus not clearly erroneous, and the court of appeals quite correctly affirmed it. See *Pullman-Standard* v. *Swint*, 456 U.S. 273, 286-287 (1982).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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